IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

TUESDAY, THE 30TH JANUARY 2007 / 10TH MAGHA 1928

RFA.No. 292 of 2004()

OS.243/2002 of PRINCIPAL SUB COURT,ERNAKULAM
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APPELLANTS/DEFENDANTS 1 & 2
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1. K.M.NAZAR, S/O.LATE MOHAMMED, BUSINESS, RESIDING AT HOUSE NO.42/1425, ST.BENADIT CROSS ROAD, KOCHI-18, ERNAKULAM VILLAGE, KANAYANNOOR TALUK, ERNAKULAM DISTRICT.

2. K.M.BABU, AGED ABOUT 36 YEARS, S/O.LATE MOHAMMED, BUSINESS, RESIDING AT HOUSE NO.42/1425, ST.BENADIT CROSS ROAD, KOCHI-18, ERNAKULAM VILLAGE, KANAYANNOOR TALUK, ERNAKULAM DISTRICT.

BY ADV. SRI.V.P. MOHAMMED NIYAZ
ADV. SRI.K. ABDUL JAWAD

RESPONDENTS/PLAINTIFF AND 3RD DEFENDANT:
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1. K.M.ARIFA, W/O .P.M. ABID ALI, AGED 38 YEARS, HOUSE WIFE, RESIDING AT K.S.APARTMENTS, S.R.M.ROAD, COCHIN-18, ERNAKULAM VILLAGE,KANAYANNOOR TALUK, ERNAKULAM DISTRICT.

2. K.M.SHAREEFA SAKKAF, W/O. SAKKAF,
HOUSE WIFE, HOUSE NO.44/2174, (NEW NO.62/1515)
FREEDOM ROAD, OPPOSITE TO MODERN SCHOOL,
KALOOR, KOCHI-17, ERNAKULAM VILLAGE,
KANAYANNOOR TALUK, ERNAKULAM DISTRICT.

BY ADV. SRI.P.M. SAJI

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 30/01/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.No. 3669 OF 2006 IN R.F.A. No. 292 OF 2004

DISMISSED.

30.01.2007

SD/- KURIAN JOSEPH, JUDGE.
SD/- K.T. SANKARAN, JUDGE.

/true copy/

P.A. TO JUDGE

KURIAN JOSEPH & K.T. SANKARAN, JJ.

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R.F.A. No. 292 OF 2004

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Dated this the 30th January, 2007

J U D G M E N T

Kurian Joseph, J:

This appeal is at the instance of the defendants Nos. 1 and 2 in a suit for partition, O.S.No. 243 of 2002 on the file of the Sub Court, Ernakulam . 'A' and 'B' schedules form the immovable properties and 'C' schedule is movable property. Of the immovable properties, 1/4th share of the plaintiff is conceded. The court below, with regard to 'C' schedule, held that the same is not partible and that the same is absolute property of the defendants Nos. 1 and 2/appellants. In the written statement filed by the appellants, it was submitted that the hotel business in the 'A' and 'B' schedule properties was conducted only by the defendants Nos. 1 and 2 and that neither the plaintiff nor the third defendant had any say in the matter. However, the plaintiff as well as the third defendant were being paid an amount of Rs.2,000/- each per month as share of rent. On the basis of such a submission in the written statement, the trial court passed

the following decree as far as the share of rent is concerned.

> *"The share of rent which have accrued on the property during the period prior to the institution of the suit until delivery of possession to the plaintiff shall be assessed within permissible limits during final decree proceedings in accordance with law. While assessing share of rent due to the plaintiff, the admission made by the defendants in the written statement has to be taken into account."*

2. Learned counsel appearing for the appellants submits that on the mere averment in the written statement, the court below, without giving them an opportunity to adduce evidence on the amounts payable and actually paid, should not have passed such a decree. We are afraid that such a contention cannot be appreciated. What the plaintiff claimed in the suit was rendition of accounts on the profit realised by the defendants from the hotel business conducted in the 'A' and 'B' schedule properties and share thereof with effect from 10.04.1999, three years prior to the institution of the suit.

3. In view of the undisputed stand taken by the defendants in the written statement that share of rent to the tune of Rs.2,000/- was being paid to the plaintiff, instead of going into further details and taking note

also the fact that there was no dispute with regard to the partibility of 'A' and 'B' schedule properties and entitlement of 1/4th share to the plaintiff, the trial court passed the order as extracted above with regard to the share of rent. The court below also has guardedly stated that while computing the claim regarding the share of rent as decreed, the amounts already paid by the defendants as stated in the written statement, will be taken into account. Therefore, the appellants will get every opportunity at the final decree stage regarding the payments they have already made.

Therefore we do not find any merit in this appeal and it is accordingly dismissed.

KURIAN JOSEPH,
JUDGE.

K.T. SANKARAN,
JUDGE.

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